

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN McKUNE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court of
the Eastern District of Washington,
Southern Division.

BRIEF OF PLAINTIFF IN ERROR.

Hon. J. STANLEY WEBSTER, Judge.

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P. V. DAVIS,

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CHAS. F. BOLIN,

Toppenish, Wash.,

Counsel for Plaintiff in Error.

No. 4144.

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHN McKUNE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District
Court of the Eastern District of Washing-
ton, Southern Division.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

The indictment contains eighteen counts, which constitute six separate charges of purchase, possession and sale of narcotics upon six separate occasions and defendant was found guilty upon all counts except the tenth, eleventh and twelfth.

The evidence of the Government consisted chiefly of the testimony of three private detectives, Jack T. Robertson, Mrs. J. T. Robertson and Orville Wright. Jack Robertson described his business as a special investigator, or a stool-pigeon.

Jack Robertson testified that on April 10th, 1922, he purchased of defendant cocaine (Exhibit No. 1) for which he paid defendant five dollars. That on April 12th, 1922, he purchased of defendant cocaine (Exhibit No. 2), for which he paid five dollars.

That on April 15th, 1922, he purchased two bindles of cocaine from defendant for which he paid defendant two dollars.

Mrs. J. T. Robertson testified she purchased cocaine from the defendant (identification No. 4) on April 11, 1922, for which she paid the defendant \$5.00 (five dollars).

Orville Wright testified that on April 14, 1922, he purchased from the defendant cocaine (exhibit No. 5) for which he paid defendant five dollars (\$5.00).

On cross-examination these three witnesses admitted that they were not in the employ of the United States Government; that they were special detectives, or private investigators or stool-pigeons. The woman, Mrs. J. T. Robertson, upon cross-examination in answer to the question, had she ever been a prostitute, replied in the negative.

The defendant in his case offered to prove by the witness, Amy Luloff, actions and conduct of said witness Mrs. Robertson, proving that the said Mrs. Robertson had been prostituting.

The defendant at the close of the Government's case moved for a directed verdict on the ground that the Government's evidence clearly showed an entrapment by the private detectives, Jack Robertson, Mrs. J. T. Robertson, and Orville Wright; that such entrapment by private detectives who were

not United States officers and not employed by the United States Government for the purpose of enforcing revenue laws or congressional acts brought case within the rule that the defendant was entitled to an acquittal upon that class of testimony.

The Court overruled the motion but stated that the question could be renewed upon a motion for new trial.

The defendant was found guilty upon (15) fifteen counts; and motion for a new trial was duly presented and denied to which ruling exception was taken and allowed.

There are but two points which are covered by three assignments of error.

The assignments of error numbers 1 and 3 go to the same point.

I.

ASSIGNMENTS OF ERRORS.

The Court erred in overruling the motion of defendant for a directed verdict of not guilty interposed by defendant based upon the ground that any alleged offenses that had been attempted to be proven were shown conclusively and affirmatively to have been established by evidence secured illegally in that the same was not procured by the Government of the United States, but by private parties who called themselves "private investigators," who with the purpose of inducing and entrapping the defendant to commit a crime did induce him to commit a crime, to wit, the crime of selling prohibited narcotics to such "private investigators," and indirectly and by operation of law, the crimes of purchasing and having in his possession such

prohibited narcotics without having complied with the Federal Acts in relation thereto, all as charged in the different counts in the indictment.

II.

Error of the Court in sustaining an objection of the Government to an offer by the defendant to prove by Mrs. Amy Luloff, a witness for defendant, acts of prostitution, or acts (25) from which prostitution could be reasonably inferred on the part of Mrs. Jack Robertson, one of the main witnesses for the Government, who had testified on cross-examination in answer to an interrogatory of defendant as to whether she had ever been a prostitute that she had not.

III.

Error of the Court in overruling defendant's motion for a new trial predicated upon errors of law embodied in assignments of error I and II herein.

Minds of reasonable men can differ as to the solution of these points.

The view of appellant is that when an entrapment is to be permitted to secure conviction for violation of a Federal law the entraper, at least, should be an officer of the Government or in the employ of the Government or have some standing, other than being a mere stool-pigeon or special detective of doubtful character.

Some of the authorities that support this view are,

Grimm vs. United States, 156 U. S. 604, 39
L. Ed. 550.

Andrews vs. United States, 162 U. S. 420, 40 L. Ed. 1023.

Woo Wai vs. United States, 223 Federal, 412.

Butts vs. United States, 273 Fed. 35.

As to assignment number II, the defendant offered to prove that one of the main witnesses for the Government was a prostitute by showing acts of prostitution on her part, after the witness in answer to a question on cross-examination, as to whether she was a prostitute, testified she was not and she never had been. The Court sustained the objection of the Government.

Some authorities hold that under the circumstances the defendant is bound by her answer, while others take a broader view and hold that the material question that the jury may pass on is the credibility of the witness and whether or not, in fact and truth, she is a prostitute.

State vs. Jackson, 83 Wash. 504, pg. 527.

In the opinion by Judge Chadwick, he said:

"It is not the manner of proof that concerns the law so much as the object sought to be attained, for, as said by this Court in the *Coella* case, a woman cannot ruthlessly destroy that quality upon which most other good qualities are dependent and for which, above all others, a woman is revered and respected, and retain her reputation for truthfulness unsmirched. We can mark no distinction between receiving evidence as to the reputation of a witness for truth and veracity and receiving evidence of reputation as to moral charac-

ter, when this Court has said that a reputation for immorality is a thing to be considered when passing upon the credibility of a witness.”

State vs. Wingard, 92 Wash. 219, 158 Pac. pg. 728.

Tla-Koo-Yel-Lee vs. United States, 167 U. S. 274, 42 L. Ed. 166.

State vs. Pickle, 200 Pac. 319, 116 Wash. 600.

We do not think any human being should be sent to the penitentiary upon the class of evidence relied upon by the Government in this case.

The writer of this brief has been confined to his bed for nearly two months and has been unable to give the Court the benefit of an elaborate investigation of the questions involved, made prior to determining to present an appeal.

His associate, Mr. Davis, has not been with him for some time and Mr. Bolin has been away a great deal of the time, and left the preparation of this brief to the writer.

On behalf of the appellant we trust that the Court, with the assistance with the few authorities cited, will be able to comprehend the contentions of the appellant as fully as if it had the benefit of a long brief.

Very respectfully submitted by,

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